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APR -7 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0316-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ROBERT WILLIAM DUTCHER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-21173

Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Robert W. Dutcher

Florence
In Propria Persona

B R A M M E R, Judge.

¶1 After a jury found petitioner Robert Dutcher guilty of six counts of sexual conduct with a minor under the age of fifteen, two counts of child molestation of a minor under the age of fifteen, and one count of sexual abuse with a child under the age of

fifteen, he was convicted and sentenced in 1989 to consecutive, presumptive terms of imprisonment, some enhanced, including two consecutive life sentences. We affirmed Dutcher's convictions and sentences on appeal, *State v. Dutcher*, No. 2 CA-CR 89-0397 (memorandum decision filed Oct. 12, 1989).

¶2 At issue here is the trial court's summary denial of relief on consolidated claims Dutcher raised in his second petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., filed in May 2008, his supplemental Rule 32 petition filed in May 2009, and his December 2008 petition for writ of habeas corpus, properly construed as a Rule 32 petition. *See* Ariz. R. Crim. P. 32.3 (Rule 32 procedures govern petition for writ of habeas corpus challenging validity of conviction or sentence). In those petitions, Dutcher argued: (1) his sentences were illegal pursuant to *State v. Brown*, 191 Ariz. 102, 952 P.2d 746 (App. 1997); (2) his trial and appellate counsel had been ineffective in failing to challenge his sentences at trial and on appeal; and (3) the court had lacked subject matter jurisdiction because the indictment against Dutcher failed to allege his actions were committed "knowingly" or "intentionally."

¶3 In a six-page ruling, the trial court found each of these claims precluded and explained why none of them fell within the exceptions to preclusion identified in Rule 32.2(b). In his petition for review, Dutcher maintains he was entitled to an evidentiary hearing because he raised colorable claims for relief based on a significant change in the law, *see* Ariz. R. Crim. P. 32.1(g), and the court's alleged lack of subject matter jurisdiction. As to his claims for relief based on Rule 32.1(g), Dutcher's petition contains no argument and no citations to either the record or pertinent authority; instead,

“as the [p]etition for review argument,” he simply refers us to his June 2009 affidavit and “Supplemental Correction and Clarification (Sentence)” (a supplement to the supplemental petition he filed in May 2009), and his July 2009 reply to the state’s opposition to his petitions for post-conviction relief, appended to his petition. He has thus failed to comply with Rule 32.9(c)(1)(iii), (iv), and we reject these claims summarily. *See State v. French*, 198 Ariz. 119, ¶ 9, 7 P.3d 128, 131 (App. 2000) (summarily rejecting claims incorporated by reference to memoranda filed below), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *see also State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984) (“Petitioners must strictly comply with Rule 32 or be denied relief.”).¹

¶4 In his remaining challenge to the trial court’s ruling, Dutcher relies on *State v. Smith*, 66 Ariz. 376, 189 P.2d 205 (1948), and *Paxton v. Walters*, 72 Ariz. 120, 231 P.2d 458 (1951), to suggest an insufficient indictment “confer[s] no jurisdiction upon the court,” *id.* at 124, 231 P.2d at 460. Although his meaning is not entirely clear, Dutcher may have intended to argue his claim of a deficient indictment is not precluded by waiver

¹Had Dutcher complied with Rule 32.9, we, like the trial court, would have declined to address the new claims for relief Dutcher sought to raise in these documents, including his claim that his sentences were grossly disproportionate to sentences for similar crimes committed after certain statutes were amended or enacted in 1993. *See* 1993 Ariz. Sess. Laws, ch. 255, §§ 7, 25; *see also* Ariz. R. Crim. P. 32.9(c) (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review”). As the trial court explained in its ruling, Dutcher had not sought leave to amend his petition with his June supplements and had failed to show good cause for doing so. *See* Ariz. R. Crim. P. 32.6(d). Moreover, a court does not abuse its discretion in declining to consider a new Rule 32 claim raised for the first time in a petitioner’s reply. *State v. Lopez*, 223 Ariz. 238, ¶ 7, 221 P.3d 1052, 1054 (App. 2009).

because subject matter jurisdiction may not be waived. *See, e.g., State v. Chacon*, 221 Ariz. 523, ¶ 5, 212 P.3d 861, 864 (App. 2009). To the extent Dutcher makes such an argument, we reject it. Our supreme court has clarified that the insufficiency of an indictment or information does not implicate subject matter jurisdiction and, therefore, is subject to waiver. *See State v. Maldonado*, 223 Ariz. 309, ¶¶ 13, 22-25, 223 P.3d 653, 655, 657 (2010) (abrogating *Smith* and *Paxton*).

¶5 We will not disturb a trial court’s denial of post-conviction relief unless we find the court abused its discretion. *State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996). Here, the court clearly identified, thoroughly analyzed, and correctly resolved all of the issues Dutcher properly presented, and we need not restate that analysis. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We find no abuse of discretion. Moreover, because the court correctly ruled on the issues Dutcher raised “in a fashion that will allow any court in the future to understand the[ir] resolution,” *id.*, we adopt its order denying post-conviction relief. Thus, although we grant the petition for review, we deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge

